

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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JAMES SANFORD,

NO. CIV. S 02-0480 MCE JFM

Plaintiff,

v.

ORDER

THRIFTY PAYLESS, INC., dba  
RITE AID CORPORATION,

Defendant.

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Through the present motion, Plaintiff James Sanford ("Plaintiff") seeks attorney's fees and litigation expenses, pursuant to both state law and 42 U.S.C. § 12205 of the Americans with Disabilities Act ("ADA"), as a result of his May 24, 2005 acceptance of an Offer of Judgment submitted by Defendant Thrifty Payless, Inc. dba Rite Aid ("Rite Aid") pursuant to Federal Rule of Civil Procedure 68. Pursuant to that Offer of Judgment, Rite Aid agreed to pay \$4,001.00 in damages to Plaintiff, and further agreed to remedy certain Title III ADA violations, as alleged by

1 Plaintiff, pertaining to Rite Aid's facility located at 4980  
2 Freeport Blvd. In Sacramento. Plaintiff now requests \$28,531.50  
3 for fees incurred by various attorneys, paralegals, and legal  
4 assistants, and \$20,708.30 for costs and litigation expenses, for  
5 a total of \$49,239.80. Rite Aid opposes the motion, claiming  
6 that the fees and expenses sought are excessive and unreasonable.  
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8 **BACKGROUND**  
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10 This dispute arises from Plaintiff's claim that he  
11 encountered architectural barriers making it difficult or  
12 impossible for him to access various portions of Rite Aid's  
13 Sacramento Freeport facility. Plaintiff is a quadriplegic with  
14 limited arm strength, and requires the use of a wheelchair for  
15 mobility.

16 Plaintiff filed his lawsuit against Rite Aid on March 6,  
17 2002. On September 5, 2003, Plaintiff moved for summary  
18 judgment, or in the alternative for summary adjudication of  
19 issues, claiming that his declaration, as well as expert  
20 declarations obtained from Ronald Wilson and Joe Card,  
21 established his entitlement to judgment as a matter of law  
22 against Rite Aid. The Court denied Plaintiff's motion, by  
23 Memorandum and Order filed October 17, 2003, on grounds that the  
24 proffered declarations were inadmissible and failed to support  
25 his request for summary judgment.

26 Thereafter, as stated above, Plaintiff accepted Rite Aid's  
27 Offer of Judgment in this case, which included provisions for  
28 both payment of damages in the amount of \$4001.00 as well as

provisions for remediating Rite Aid's claimed ADA violations.  
Plaintiff filed the instant motion for fees and costs after  
judgment was entered against Rite Aid on or about June 9, 2005.

STANDARD

Plaintiff's complaint alleged violations of federal and California law. Plaintiff's federal claim arose under the ADA, while his state law claims arose under the California's Unruh Act, Cal. Civ. Code § 51, California Health & Safety Code § 19953, and the California Disabled Persons Act, Cal. Civ. Code § 54-55.

Section 12205 of the ADA authorizes a court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . ." 42 U.S.C. § 12205. A prevailing plaintiff under a statute so worded "should recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 461 U.S. 424, 429 (1976).

Section 55 of the California Disabled Persons Act provides that "the prevailing party in the action shall be entitled to recover reasonable attorney's fees." Cal. Civ. Code § 55. Also, under California Health & Safety Code § 19953, "[a]ny person who is aggrieved or potentially aggrieved by a violation of this part . . . may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

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2                   **ANALYSIS**  
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4                 Rite Aid does not dispute that Plaintiff, as the prevailing  
5 party in this litigation, may recover both attorneys' fees, as  
6 well as litigation expenses and costs, in pursuing the instant  
7 case. Rite Aid nonetheless asserts that the Court should  
8 exercise its discretion in determining that, under the  
9 circumstances present, those fees and expenses should either be  
10 disallowed in their entirety or significantly reduced.

11                 Rite Aid first asks the Court to follow the Central  
12 District's recent decision in Doran v. Del Taco, Inc., 373 F.  
13 Supp. 2d 1028 (C.D. Cal. 2005), which denied attorneys' fees in  
14 an ADA case where the plaintiff had neither provided pre-  
15 litigation notice of his intent to sue nor afforded the  
16 defendant, prior to suit, a reasonable opportunity to cure any  
17 alleged violations. As even the Doran court recognized,  
18 however, there is no Ninth Circuit precedent requiring an ADA  
19 plaintiff to provide notice before filing suit. Id. at 1031.  
20 Indeed, in Botosan v. Paul McNally Realty, 216 F.3d 827, 832 (9<sup>th</sup>  
21 Cir. 2000), the Ninth Circuit held squarely to the contrary.  
22 Moreover, as Doran further concedes, repeated efforts by Congress  
23 to amend the ADA to provide pre-suit notice have uniformly  
24 failed. Id. Consequently, even assuming Plaintiff failed to  
25 provide Rite Aid with adequate notice of its ADA shortcomings  
26 before instituting this lawsuit, the Court declines to rely on  
27 the reasoning of Doran in altogether denying Plaintiff's instant  
28 request for fees/expenses.

1        This Court must therefore determine the extent to which  
2 attorneys' fees and litigation expenses are recoverable. In  
3 making that assessment, the Court must identify the applicable  
4 "lodestar" for calculating attorneys' fees. Under the lodestar  
5 method, a court multiplies the number of hours the prevailing  
6 attorney reasonably expended on the litigation by a reasonable  
7 hourly rate. See Hensley, 461 U.S. at 433; see also Ketchum v.  
8 Moses, 24 Cal. 4th 1122, 1132 (2001) (expressly approving the use  
9 of prevailing hourly rates as a basis for the lodestar). Courts  
10 may then adjust the lodestar to reflect other aspects of the  
11 case. See Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70  
12 (9th Cir. 1975); see also Serrano v. Priest, 20 Cal. 3d 25  
13 (1977).

14       Turning first to the number of hours reasonably billed, the  
15 Court finds that certain categories of claimed fees are  
16 unreasonable and will not be permitted. As indicated above,  
17 Plaintiff filed a summary judgment motion based upon declarations  
18 that even he conceded were inadmissible. Plaintiff should not be  
19 permitted to recover fees based on that ill-taken motion.

20       Fees for unsuccessful stages of litigation are not  
21 recoverable, unless such un unsuccessful stage was a necessary  
22 step towards ultimate victory. Cabrales v. County of Los  
23 Angeles, 935 F.2d 1050, 1053 (9<sup>th</sup> Cir. 1991). Given the clear  
24 deficits of Plaintiff's motion and the fact that the case settled  
25 soon thereafter based on Rite Aid's Offer of Judgment, this Court  
26 cannot conclude that the summary judgment was a necessary step  
27 towards victory. No fees or expenses associated with that motion  
28 will therefore be allowed. A total of \$4,399.50 in fees will be

1 disallowed on that basis, as will \$75.03 in courier/overnight  
2 fees associated with Plaintiff's summary judgment motion.

3 Even more significant than the fees generated by Plaintiff's  
4 attempt at summary judgment were expert expenses incurred in  
5 attempting to provide factual support for the motion. In that  
6 regard, Plaintiff seeks \$15,226.62 for expenses incurred by Joe  
7 Card. No report was ever submitted on Mr. Card's behalf, and his  
8 activity in this matter consisted of preparing architectural  
9 plans with proposed changes to the Rite Aid facility, along with  
10 an unsubstantiated cost breakdown. No proper foundation for the  
11 opinions presented in those plans was provided.<sup>1</sup> In now  
12 requesting reimbursement for the cost of Mr. Card's services,  
13 Plaintiff submits a three line invoice that provides little  
14 evidence as to just what Mr. Card actually did, let alone whether  
15 his charges are reasonable, as they must be for this Court to  
16 direct that they be paid by Rite Aid. Moreover, Mr. Card's work  
17 was performed to support a baseless summary judgment motion in  
18 any event. The Court must therefore conclude that Plaintiff  
19 should not be permitted to recoup any monies paid for Mr. Card's  
20 services.

21 Two other general classifications of fees sought by  
22 Plaintiff will also not be permitted. Plaintiff seeks a total of  
23 \$1,842.75 for services performed by legal assistants in this  
24 case. While the Court will permit recovery of time expended by  
25 paralegals (see Shaffer v. Superior Court, 33 Cal. App. 4<sup>th</sup>

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26       <sup>1</sup>While Plaintiff did provide an amended declaration of Mr.  
27 Card in reply to Rite Aid's opposition, that declaration was  
28 procedurally improper and was consequently not admissible in  
determining the propriety of summary judgment.

1 993 (1995)),<sup>2</sup> secretarial costs are deemed by courts within  
2 this circuit to constitute overhead, or the cost of doing  
3 business, and are thus not separately reimbursable. See,  
4 e.g., Loskot v. USA Gas Corporation, CIV. S-01-2125 WBS KJM  
5 (E.D. April 26, 2004), citing In re Pac. Exp., Inc., 56 B.R.  
6 859, 865 (Bkrtcy. E.D. Cal. 1985); In re Wepsic, 238 B.R. 845,  
7 851 (Bkrtcy. S.D. Cal. 1999) (even though attorney billed for  
8 preparation of the service of the complaint at half her hourly  
9 rate, the court disallowed the cost, finding that it was  
10 secretarial in nature and therefor part of general overhead);  
11 Connally v. Denny's Inc., CV-F 96-5521 SMS (E.D. Cal. Aug 10,  
12 1999) (holding that administrative work was not recoverable).  
13 The Court will not therefore not require that Rite Aid pay for  
14 time expended in this matter by legal assistants (\$1,842.75) on  
15 Plaintiff's behalf.

16 Finally, although Plaintiff's counsel maintains offices in  
17 Chico, he seeks reimbursement for travel time to Sacramento.  
18 This is despite the fact, as Rite Aid points out, that  
19 Plaintiff's counsel has filed literally hundreds of cases in the  
20 Sacramento Division of the Eastern District within the last five  
21 years. No evidence has been presented suggesting that  
22 Plaintiff's counsel tries more cases in Chico than in Sacramento,  
23 or that Plaintiff's counsel maintains offices outside the  
24 Sacramento area for any reason other than his own convenience.

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26       <sup>2</sup>Rite Aid does argue that certain paralegal costs should be  
27 disallowed because they were "clerical/secretarial" in nature.  
28 The Court declines, however, to parse the paralegal tasks  
performed that closely and will permit reimbursement of the  
amounts claimed by Plaintiff for paralegal services.

1 Rite Aid should not be required to shoulder travel expenses to  
2 Sacramento, and \$1,575.00 in claimed attorneys' fees for such  
3 travel will not be permitted.<sup>3</sup>

4 Aside from general classifications of time expended, which,  
5 as discussed above, were not found to be reasonable,<sup>4</sup> the Court  
6 must also determine the reasonableness of the number of hours  
7 claimed for any otherwise compensable task. In opposing the  
8 reasonableness of Plaintiff's claimed charges for preparing  
9 documents that are literally the same in this case as in dozens  
10 of other cases also filed by Plaintiff's counsel, Rite Aid points  
11 to the fact that the complaint, discovery, deposition notices and  
12 subpoenas issued in this case are no different from those  
13 generated by the myriad of other cases litigated by Plaintiff's  
14 counsel. After analyzing the billing entries generated by  
15 Plaintiff's counsel and the evidence submitted by Rite Aid, the  
16 Court agrees that the claimed charges are not reasonable. A  
17 total of \$2,425.00 in claimed fees will be deducted for that  
18 reason.

19 The above analysis all pertains to the reasonableness of the  
20 number of hours for which compensation is sought. The second

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21       <sup>3</sup>In addition, while Plaintiff claims \$700.00 for counsel's  
22 travel time to Los Angeles on July 30, 2003 for the Musser  
23 Deposition, Rite Aid claims that deposition was actually for  
24 three different cases and must be allocated accordingly.  
25 Plaintiff does not refute that assertion in his reply, and  
\$500.50 will thus be deducted from the total attorneys' fees  
claimed due to that discrepancy.

26       <sup>4</sup>Rite Aid makes an additional argument that any time  
27 expended after March 21, 2005, when its served its initial Offer  
28 of Judgment, should be excluded. The Court, however, disagrees  
due to the fact that the revised Offer of Judgment ultimately  
accepted was materially different from its predecessor in  
specifying just what remediation activities would occur.

1 step of the lodestar analysis requires that the rate sought to be  
2 charged per hour also be reasonable. Courts generally calculate  
3 reasonable hourly rates according to the prevailing market rates  
4 in the relevant legal community. Blum v. Stenson, 465 U.S. 886,  
5 895 (1984). The general rule is that courts use the rates of  
6 attorneys practicing in the forum district, in this case, the  
7 Eastern District of California, Sacramento Division. Gates v.  
8 Deukmejian, 987 F.2d 1392, 1405 (1993); Davis v. Mason County, 927  
9 F.2d 1473, 1488 (9th Cir. 1991), cert. denied 502 U.S. 899  
10 (1991).

11 The burden is on the fee applicant to produce satisfactory  
12 evidence that the requested rates are "in line with those  
13 prevailing in the community for similar services by lawyers of  
14 reasonably comparable skill, experience and reputation." Blum,  
15 465 U.S. at 895 n.11. A court will normally deem a rate  
16 determined this way to be reasonable. Id.

17 In this case, Rite Aid does not dispute the \$250.00 rate  
18 sought on behalf of attorney Lynn Hubbard for Plaintiff as  
19 unreasonable. (Opp., 15:7-8). Nor does Rite Aid question the  
20 \$75.00 hourly rate requested by Plaintiff for paralegal services.  
21 Id. Rite Aid does, however, question the \$175.00 sought by  
22 associate attorneys Scott Hubbard and Adam Sorrels. Courts in  
23 this district have generally limited associate attorney  
24 compensation to \$150 per hour in cases of this nature. See,  
25 e.g., Loskot v. USA Gas Corporation, CIV. S-01-2125 WBS KJM (E.D.  
26 Cal. April 26, 2004); Pickern v. Marino's Pizza & Italian Rest.,  
27 CIV. S-01-1096 WBS GGH (E.D. Cal. April 9, 2003); Loskot v. Pine  
28 Street Sch. Off. Bldg., CIV. S-00-2405 DFL JFM (E.D. Cal. Nov. 7,

1 2002). Consequently, after deducing 3 hours already deemed  
2 excessive by the Court as discussed above, a total of 6.4 hours  
3 remaining is reduced from \$175/hour to \$150/hour, for a total  
4 reduction of \$160.00.

5       Lastly, Plaintiff may recover, as part of the award of  
6 attorneys' fees in this matter, litigation expenses pursuant to  
7 42 U.S.C. § 2205. The term "litigation expenses" in Section  
8 12205 has been interpreted to include "the same out-of-pocket  
9 expenses that are recoverable under 42 U.S.C. § 1988." Robbins  
10 v. Scholastic Book Fairs, 928 F. Supp. 1027, 1037 (D. Or. 1996).  
11 Under Section 1988, Plaintiff recover those out-of-pocket  
12 expenses that "would normally be charged to a fee paying client."  
13 Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994).

14       As stated above, Plaintiff seeks a total of \$20,708.30 in  
15 litigation expenses. The \$15,226.62 claimed for Joe Card's  
16 services, as well as \$75.03 sought in courier/overnight expenses  
17 in connection with Plaintiff's failed summary judgment motion,  
18 has already been disallowed and will be deducted from that  
19 amount. In addition, the amount sought by Plaintiff includes  
20 some \$1,748.25 already claimed as costs pursuant to 28 U.S.C. §  
21 1920. That amount will not be awarded twice and will also be  
22 deducted. Finally, consistent with footnote 3, *supra*, expenses  
23 claimed in connection with the Musser deposition must be split  
24 between three cases, resulting in a reduction from the \$426.08  
25 claimed to \$284.05. The remaining litigation expenses sought by  
26 Plaintiff, which total \$3,516.37, will be allowed.

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CONCLUSION

Based on the foregoing, Plaintiff is entitled to reasonable attorneys' fees in the amount of \$17,628.75 and reasonable litigation expenses in the amount of \$3,516.37, for a total of \$21,145.12. Plaintiff will accordingly be awarded that amount.<sup>5</sup>

IT IS SO ORDERED.

DATED: October 11, 2005

  
MORRISON C. ENGLAND, JR  
UNITED STATES DISTRICT JUDGE

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<sup>5</sup>Because oral argument would not be of material assistance, this matter was deemed suitable for decision without oral argument. E.D. Local Rule 78-230(h).